



Correspondence

Item No. 4a

Wireless Telecommunications Facilities Ordinance Update

PA2012-057

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***Delivered via Email***

James Campbell, Principal Planner  
Community Development Department  
City of Newport Beach  
100 Civic Center Drive  
Newport Beach, CA 92660

**Subject: Proposed Amendment to Wireless Telecommunications Facilities Ordinance (PA2012-057),  
Code Amendment No. 2012-004, as revised November 21, 2013**

Dear Mr. Campbell:

We appreciate the Planning Commission and staff continuing to take the time to invite and consider industry's comments and proposed changes to the City's Proposed Wireless Telecommunications Facilities Ordinance. While we are pleased that some of industry's proposed changes have been accepted, we respectfully request additional modifications to the ordinance before it is advanced to the City Council.

AT&T has conducted a legal review of the latest draft of the ordinance and remains concerned about the overall restrictiveness of ordinance. While we recognize the importance to the City of protecting community aesthetics, the City will be best served if the ordinance strikes a balance between aesthetics and the wireless needs of its residents, businesses, and visitors. The ordinance, as drafted, would continue to seriously impede the ability of carriers to provide wireless service and violate federal and state law provisions raised in AT&T's prior comments.

Below are some examples of areas in the ordinance that remain problematic under applicable law:

**Federal Telecommunications Act of 1996 and California Public Utilities Code Section 7901**

As noted previously, the Federal Telecommunications Act of 1996 (47 U.S.C.A. § 151 *et seq.*) ("Act") grants exclusive authority to the FCC over deployment of wireless telecommunications service and preempts any conflicting state or local government regulations. It also prohibits unreasonable discrimination among providers of functionally equivalent services and any regulations that would have the effect of prohibiting the provision of personal wireless services. (47 U.S.C.A. § 332(c)(3).)

Section 7901 of the California Public Utilities Code similarly supports deployment of telecommunications facilities in the public right-of-way. Cities may only exercise reasonable control as to time, place, and manner in which roads are accessed. (Section 7901(a).) Section 7901.1(b) further requires municipal regulations at a minimum to be applied to all entities in a nondiscriminatory manner.

Here, the proposed City ordinance provisions that appear to conflict with the Act and/or Section 7901 include:

- **Section 20.49.10 – Purpose**  
The purpose statement fails to acknowledge the overall federal and state policies promoting wireless deployment. The ordinance purpose should be revised to acknowledge the importance of bringing modern wireless infrastructure to residents and businesses of Newport Beach.
- **Section 20.49.040 – Telecom Facility Preferences and Prohibited Locations**  
The proposed blanket prohibitions on certain residential areas continue to be a major concern. We appreciate the recent revisions to except public right-of-way and some common areas from prohibited locations, but the remaining prohibitions are still extensive.

These could prevent wireless providers from bringing service and upgrades to significant portions of the City, in violation of the Act. If one of the prohibited areas is the only available location for a telecom facility, this would appear to be a complete bar to the ability to provide service. There are many residents who are no longer signing up for wired services, making the need to bring wireless service to residential communities increasingly important. Blanket prohibitions do not provide the flexibility to bring needed service when residential areas are the only or best option.

Rather than providing a list of prohibited locations, we recommend that all locations be prioritized by order of preference. Categories listed as prohibited locations in the current draft could be placed at the bottom of that list, only to be considered if all properties in higher categories were considered and rejected.

- **Section 20.49.50 – General Development and Design Standards**  
This section and other areas of the proposed ordinance impose a number of rules and restrictions focused around aesthetics, including height limitations, stealth standards, limits on pole attachments, and undergrounding requirements. These are counter-productive to providing quality service and resulting cost burdens will impact the number of sites AT&T can afford to build and thus negatively impact the service the citizens of Newport Beach (our customers) receive. We believe these run counter to the Act and Section 7901.

Additionally, we are very concerned that not all of the latest technologies will be able to meet the City's restrictive aesthetics-oriented standards. To the extent that these rules favor one technology over another, or one company over another, these restrictions are again prohibited under the Act and Section 7901.

- **Section 20.49.100 – Operational and Radio Frequency Compliance and Emissions**  
Under the Act, the FCC has exclusive jurisdiction over regulation of RF emissions. Some of the proposed requirements appear to be an effort to engage in such regulation and, for that reason, might be subject to challenge. In any event, it is unclear what the City might reasonably do with the required information if not for regulatory purposes.

- **Section 20.49.60 – Permit Review Procedures**

The requirement to interface with the Chief of Police is burdensome and appears to exceed what is allowed under the Act. Additionally, we are concerned about bearing the responsibility for all of the expenses of third party consultants. Without a cap or some form of limitation on this expense, this requirement is open for abuse and can pose a significant burden to provision of service. Also, if this requirement is not consistent with applications for permits by other industries, it is impermissible discrimination.

**Middle Class Tax Relief and Job Creation Act of 2012**

As previously explained, Section 6409(a) of the Middle Class Tax Relief and Job Creation Act of 2012 requires any facility modification that does not substantially change the physical dimensions of the tower or base station at issue to be approved by the City.

Proposed City ordinance provisions that appear to violate Section 6409(a) include:

- **Section 20.49.90 – Modification and Collocation of Existing Telecom Facilities**  
This would appear to violate this act by establishing an unduly restrictive definition of “substantial change,” as any change that exceeds five percent of the physical dimensions.
- **Section 20.49.030 – Definitions**  
The definitions of “Base Station” and “Wireless Tower” remain problematic. These are too restrictive and narrowing.

Thank you for your continuing consideration of our concerns. We are happy to further discuss the issues we have raised and answer any questions you may have.

Sincerely,



Kyla C. Powell

Cc: Bradley Hillgren, Chair, City of Newport Beach Planning Commission  
Larry Tucker, Vice Chair, City of Newport Beach Planning Commission  
Members, City of Newport Beach Planning Commission